

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

In the Matter of a Commission  
Investigation Into Qwest's Compliance  
with Section 271(d)(3)(C) of the  
Telecommunications Act of 1996  
That the Requested Authorization  
Is Consistent With the Public Interest,  
Convenience and Necessity.

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND RECOMMENDATION**

This matter came on for hearing on May 28-30 and June 3, 2002, before Administrative Law Judge Allan Klein in the Large Hearing Room of the Minnesota Public Utilities Commission, 200 Metro Square Building, 121 East 7<sup>th</sup> Place, St. Paul, Minnesota. The record was closed July 18, 2002, upon receipt of the final filings by the parties.

Jonathan Frankel, Esq., Wilmer, Cutler & Pickering, 2445 M Street N.W., Washington, D.C. 20037; Douglas Nazarian, Esq., Hogan & Hartson, 555 Thirteenth St. N.W., Columbia Square Building, Washington, D.C. 20004; and Jason Topp, Qwest Corporation, 200 S. Fifth Street, Room 395, Minneapolis, Minnesota 55402, appeared on behalf of Qwest Corporation (Qwest).

Gary B. Witt, Esq., 1875 Lawrence St., 15<sup>th</sup> Floor, Denver, Colorado 80202, appeared on behalf of AT&T Communications of the Midwest, Inc., AT&T Local Services on behalf of TCG Minnesota, Inc., and AT&T Broadband Phone Company of Minnesota, Inc. (collectively AT&T).

Lesley James Lehr, Esq., 638 Summit Avenue, St. Paul, Minnesota 55105, and Gregory Merz, Gray, Plant & Mooty, 33 S. 6<sup>th</sup> Street, Suite 3400, Minneapolis, MN 55402-3796, appeared for WorldCom, Inc. (WorldCom).

Priti Patel, Esq., and Steve Alpert, Esq., Assistant Attorneys General, Minnesota Attorney General's Office, 525 Park Street, Suite 200, St. Paul, Minnesota 55103, appeared for the Department of Commerce (the Department or DOC).

Peter R. Marker, Esq., Assistant Attorney General, Minnesota Attorney General's Office, 445 Minnesota Street, Suite 900, St. Paul, Minnesota 55101, appeared for the Residential Utility and Small Business Division (OAG/RUD).

Michael Bradley, Esq., Moss & Barnett, 90 S. Seventh St., Suite 4800, Minneapolis, Minnesota 55402, appeared for Ace Telephone Association; BEVCOMM,

Inc.; Encore Communications; Hutchinson Telecommunications, Inc.; Mainstreet Communications, Inc.; NorthStar Access, LLC; Otter Tail TelCom, LLC; Paul Bunyan Rural Telephone Cooperative; Tekstar Communications, Inc.; Unitel Communications; U.S. Link, Inc.; and VAL-ED Joint Venture, LLP, d/b/a 702 Communications (collectively the CLEC Coalition) and the Minnesota Independent Coalition (MIC), a coalition of approximately 80 independent ILECs serving primarily rural areas in Minnesota.

Joy Gullikson, Director of External Affairs, 10405 Sixth Avenue North, Plymouth, MN 55441, appeared for Onvoy, Inc.

Barbara Ross, Esq., Best & Flanagan, 4000 USBank Place, 601 Second Avenue South, Minneapolis, Minnesota 55402, appeared for Popp Telecom, Inc.

Diane Wells appeared on behalf of the staff of the Minnesota Public Utilities Commission.

### **NOTICE**

Notice is hereby given that pursuant to Minn. Stat. § 14.61, and the Rules of Practice of the Public Utilities Commission and the Office of Administrative Hearings, exceptions to this report, if any, by any party adversely affected must be filed within 20 days of the mailing date hereof and replies to exceptions within 10 days after that, or such other date as established by the Commission's Executive Secretary.

Questions regarding the filing of exceptions should be directed to Dr. Burl Haar, Executive Secretary, Minnesota Public Utilities Commission, Suite 350 Metro Square, 121 Seventh Place East, St. Paul, MN 55101. Exceptions must be specific and stated and numbered separately. Oral argument before a majority of the Commission will be permitted to all parties adversely affected by the Recommendation who request such argument. Such request must accompany the filed exceptions or reply, and an original and 14 copies of each document should be filed with the Commission.

The Minnesota Public Utilities Commission will make the final determination of the matter after the expiration of the period for filing exceptions as set forth above, or after oral argument, if such is requested and had in the matter.

Further notice is hereby given that the Commission may, at its own discretion, accept or reject the Administrative Law Judge's Recommendation and that said Recommendation has no legal effect unless expressly adopted by the Commission as its final order.

### **STATEMENT OF ISSUES**

The issues in this matter are whether Qwest has demonstrated by a preponderance of the evidence that its application to provide interLATA services in Minnesota complies with the requirements of 47 U.S.C. § 271(c)(1)(A) (known as the "Track A" requirement) and is consistent with the public interest, convenience, and necessity, as required by 47 U.S.C. § 271(d)(3)(C).

Based upon all the proceedings herein, the Administrative Law Judges makes the following:

## **FINDINGS OF FACT**

### **Statutory Framework—Jurisdiction and Authority**

1. The Telecommunications Act of 1996 conditions entry by a Bell Operating Company (BOC) into the provision of in-region interLATA services (commonly known as "long distance") upon compliance with certain provisions of 47 U.S.C. § 271. BOCs must apply to the Federal Communications Commission (FCC) for authorization to provide interLATA services originating in any in-region state. The FCC must issue a written determination on each application no later than 90 days after receiving such application.<sup>[1]</sup>

2. Section 271 requires the FCC to make various findings before approving BOC entry. In order for the FCC to approve a BOC's application to provide in-region interLATA services, a BOC must first demonstrate, with respect to each state for which it seeks authorization, that it satisfies the requirements of either § 271(c)(1)(A) (Track A) or § 271(c)(1)(B) (Track B).<sup>[2]</sup> The BOC must also show that (1) it has "fully implemented the competitive checklist" contained in § 271(c)(2)(B); (2) the requested authorization will be carried out in accordance with the requirements of § 272; and (3) the BOC's entry into the in-region interLATA market is "consistent with the public interest, convenience, and necessity."<sup>[3]</sup> The statute specifies that, unless the FCC finds that these criteria have been satisfied, the FCC shall not approve the requested authorization.

3. The FCC must consult with the relevant state commission to verify whether the BOC has opened its local markets to competition in compliance with the requirements of § 271(c). State commissions have the responsibility under § 271(d)(2)(B) to advise the FCC whether to grant or deny the BOC's request to provide interLATA service within that state. The FCC has defined the state commission's primary goal as development of a comprehensive factual record concerning BOC compliance with the requirements of section 271 and the status of local competition.<sup>[4]</sup>

4. The 1996 Act conditions entry by a BOC into the in-region interLATA long distance market with certain market-opening requirements contained in section 271 of the Act. Among these requirements, a BOC must demonstrate that it has complied with the provisions of 47 U.S.C. §§ 271(c)(1)(A) and 271(d)(3)(C). The first of these two sections (the Track A requirement) requires a BOC to demonstrate that it has signed binding interconnection agreements with one or more facilities-based competitors that collectively are providing telephone exchange service to business and residential customers in the state. The second section (the public interest requirement) requires a BOC to show that the grant of its application is "consistent with the public interest, convenience, and necessity."<sup>[5]</sup>

## Procedural Background

5. On September 11, 2001, the Minnesota Public Utilities Commission issued a Notice and Order for Hearing in In the Matter of an Investigation Regarding Qwest's Compliance with Section 271 of the Telecommunications Act of 1996 with Respect to the Provision of InterLATA Services Originating in Minnesota, Docket No. P-421/C1-96-1114. The Commission referred the matter to the Office of Administrative Hearings for contested case proceedings.

6. The initial prehearing conference was held on September 21, 2001, and a schedule was established for later proceedings. The schedule provided for hearings in the winter and spring of 2002. However, parts of the schedule were dependent on the completion of the ROC OSS Report.<sup>[6]</sup>

7. The Administrative Law Judges responsible for the Section 271 proceeding divided it into several specialized dockets. Each docket addresses issues arising from a different aspect of the Act's standards for § 271 approval. This docket, No. 1373, addresses compliance with the Track A and public interest requirements.<sup>[7]</sup>

8. On December 10, 2001, Qwest filed a lengthy cover brief, an affidavit, and exhibits in support of its position that it qualified for Track A and that its entry into the long distance market would serve the public interest.

9. Delays in completing the ROC OSS study and report, along with very significant discovery work, led to a series of schedule changes, both for this docket and other § 271 dockets. Initially, the hearing in this docket was scheduled for March, but the scheduling changes moved it into late May.

10. On May 3, 2002, the Department and other parties filed prefiled testimony. On May 15, Qwest filed responsive materials, and on May 23, the Department and other parties filed surrebuttal materials.

11. The month of May 2002, was marked by not only the filing of testimony and last minute discovery activities, but also the filing of a flurry of motions. A number of these motions revolved around the interplay between this docket (the "Public Interest" docket) and a separate Commission investigation (the "Unfiled Agreements" docket).<sup>[8]</sup> The Unfiled Agreements docket deals with a number of agreements entered into between Qwest and various CLECs. These agreements were not filed with the Commission as interconnection agreements, as the Department (and others) assert they should have been. The Department and other parties also argued that the existence of these agreements, and in particular some of their terms, raise issues appropriately considered in the Public Interest docket. A variety of timing concerns resulted in evidentiary hearings being held in the Unfiled Agreements docket between April 29 and May 2, 2002, roughly one month before the evidentiary hearings in the Public Interest docket.

12. On May 20, 2002, the Department learned of another unfiled agreement that it had not previously been able to document. On May 21, the Department filed a

motion to bifurcate issues in the Public Interest docket, urging that those issues not related to unfiled agreements be heard as scheduled on May 28, but that those issues related to unfiled agreements be heard at some later date after the Department had been able to develop its evidence on the newly-discovered agreement. On May 22, at a previously scheduled prehearing conference, the parties presented their positions on the motion and there was a general discussion of the best way to integrate material from the Unfiled Agreements docket into the Public Interest docket without relitigating, particularly in light of the new information just discovered by the Department. The Administrative Law Judge took the matter under advisement, and later in the day informed the parties that he was going to deny the Department's motion to bifurcate the Public Interest hearing, and the hearing would go forward as scheduled on May 28, but that the Department could bring a motion to reopen the Unfiled Agreements docket to present the newly-discovered evidence. The Administrative Law Judge also informed the parties that the hearing record from the Unfiled Agreements docket, including any reopened portions, would become part of the hearing record in the Public Interest proceeding. On May 23, the Administrative Law Judge issued an Order memorializing the decisions on the various motions discussed on the previous day.<sup>[9]</sup>

13. The Public Interest evidentiary hearing did go forward from May 28 through 30 and on June 3. The parties presented public interest aspects of the unfiled agreements without relitigating material already discussed earlier in the month. Several weeks later, on August 6, the evidentiary hearing in the Unfiled Agreements case was reopened and additional testimony was taken relating to the newly-discovered agreement. Pursuant to the Eighteenth Prehearing Order, the entire record from the Unfiled Agreements docket, both the original portion and the reopened portion, is a part of the record in this Public Interest portion of the overall 271 proceeding.

14. On June 3, the last day of the Public Interest evidentiary hearing, there was discussion of how the yet-to-be reopened Unfiled Agreements material could be included in the briefing and decision making in this Public Interest docket. <sup>[10]</sup> The Administrative Law Judge announced that briefing and the report in this Public Interest docket would go forward on schedule, without waiting for his report and Commission decision in the Unfiled Agreements matter, but that by the time the Commission was making its final decision in this Public Interest docket, it would have all of the facts and arguments available from the Unfiled Agreements proceeding available for its consideration.<sup>[11]</sup> The Administrative Law Judge's Report in the Unfiled Agreements docket is due on September 20, 2002.

## **TRACK A**

15. The Track A requirements of § 271(c)(1)(A) require a BOC to demonstrate that: (1) Qwest has one or more binding agreements with CLECs that have been approved under section 252 of the Act; (2) Qwest provides access and interconnection to one or more unaffiliated competing providers of telephone exchange service; (3) these competing providers collectively provide telephone exchange service to residential and business subscribers; and (4) these competing providers offer telephone exchange service to business or residential customers either exclusively over

their own telephone service facilities, or predominantly over their own telephone service facilities in combination with resale.<sup>[12]</sup> For purposes of this analysis, "own" telephone service facilities includes both facilities-based CLECs and CLECs leasing unbundled network elements from the BOC.<sup>[13]</sup>

16. With respect to the second criteria of Track A, the FCC requires that there be at least one "competing provider" in the state that is "actually . . . in the market and operational (*i.e.*, accepting requests for service and providing such service for a fee)"<sup>[14]</sup> and "serving more than a *de minimis* number of end-users."<sup>[15]</sup> These minimal requirements are designed to ensure that the CLEC is presently "an actual commercial alternative" in the market and not simply in the planning or testing stages.<sup>[16]</sup> Section 271(c)(1)(A) does not require the BOC to show that competing providers provide any specific level of geographic penetration or serve a specific market share in its service area. Geographic penetration or competitive conditions may be considered, however, in the analysis of the public interest, convenience, and necessity.<sup>[17]</sup>

- 17. As of October 31, 2001, Qwest had entered into 80 binding and approved wireline interconnection agreements in Minnesota.<sup>[18]</sup> Qwest had also entered into 30 approved resale, 19 wireless, and four paging agreements as of the same date.<sup>[19]</sup> These agreements contain the terms, conditions, and prices applicable to the provision of network interconnection, access to unbundled network elements, ancillary network services, and telecommunications services available for resale in Minnesota.

18. None of the 80 approved interconnection agreements is with a provider affiliated with Qwest.<sup>[20]</sup> Some of the providers, however, have more than one interconnection agreement. As of October 31, 2002, 64 CLECs were actively purchasing access and interconnection wholesale services in Minnesota.<sup>[21]</sup> In total, as of October 31, 2001, Qwest was providing 150,129 business and residential access lines via stand alone UNE loops and UNE-platforms, 89,944 lines for resale,<sup>[22]</sup> and 112,556 interconnection trunks<sup>[23]</sup> to CLECs in Minnesota. Of the 89,944 resale lines, Minnesota CLECs provided 47,369 business and 42,575 residential access lines.<sup>[24]</sup>

19. Qwest does not have access to the number of CLEC-owned loops in service, as CLECs consider this information to be proprietary. For the purpose of estimating facilities-based competition and total CLEC market share in Qwest exchanges, Qwest has relied on three sources of data: E911 records, interconnection trunks, and ported numbers.<sup>[25]</sup>

### **E911 Data**

20. Facilities-based CLECs that use their own switches are responsible for directly inputting telephone numbers for those customers into the E911 database, which identifies CLECs by NXX code and company identification code.<sup>[26]</sup> As of October 31, 2001, CLECs had input 527,317 Minnesota customer telephone numbers into the database, of which 150,694 were associated with residential lines.<sup>[27]</sup> From these counts, Qwest estimated total CLEC market share by subtracting the number of stand-

alone unbundled loops, adding UNE-platform loops and resold lines, and dividing that sum by the estimated total number of local exchange lines in service in Minnesota. Using this method, Qwest estimated that the CLEC market share throughout Minnesota was 25.1%.<sup>[28]</sup> The same method produces a CLEC market share of 24.7% in Qwest's service territory.<sup>[29]</sup>

21. The Department's witness, Dr. Selwyn, contends that this estimation method overstates the number of CLEC lines, mainly because of the lack of uniformity regarding how CLECs enter information into the E911 database. For example, direct inward dialing (DID) is a service feature that allows inward-directed calls to a PBX to reach a specific extension without human intervention. Typically each extension has its own seven-digit telephone number.<sup>[30]</sup> The record suggests that some CLECs enter all DID numbers assigned to a customer into the database, whereas others report only those in use.<sup>[31]</sup> It is unclear what cumulative effect these differing practices would have on the number of E911 records.

### ***LIS Trunks***

22. CLECs use interconnection trunks (which Qwest calls Local Interconnection Service, or LIS trunks) to connect their switching facilities to Qwest's wire center or tandem switch so that they can pass traffic between CLEC and Qwest customers. These LIS trunks are used only to exchange traffic from lines provided through CLEC-owned facilities or UNE loops; they are not used for resale or UNE-Platform lines. As of October 31, 2001, CLECs in Minnesota used 112,556 LIS trunks.<sup>[32]</sup> Because each CLEC trunk serves, on average, between 2.75 and 5.0 lines, Qwest used these ratios to estimate that CLECs provide 238,511 to 491,762 facilities-based lines in Minnesota, which translates to a CLEC market share of 18.7% to 26.0%.<sup>[33]</sup> No party has specifically criticized this method when the 2.75 line-to-trunk ratio is used, except on the basis that it is an estimate as opposed to a verifiable count.

### ***Ported Numbers and White Page Listings***

23. Generally, customers "port" telephone numbers when they leave Qwest for a competitor that provides service through its own facilities or through stand-alone UNE loops (numbers are not ported to CLECs serving customers through UNE-Platform or resale). As of October 31, 2001, Qwest reported 469,570 ported numbers in use by CLEC customers in Minnesota.<sup>[34]</sup>

24. Qwest combined ported number data and CLEC customer phone numbers listed in Qwest's white pages database.<sup>[35]</sup> After adjusting the ported numbers on the basis of two ported numbers for each loop in service, and removing the stand-alone unbundled loops (76,738), Qwest determined that facilities-based CLECs have 163,767 business lines. To estimate the number of CLEC-owned residential loops, Qwest counted the number of residential telephone numbers listed in the white pages database that are provided by facilities-based CLECs and subtracted the UNE platform loops, to determine that as of October 2001, facilities-based CLECs have 55,803

residential listings. When all business and residential lines are combined (UNE platform, UNE stand-alone, resale, and facilities-based) they produce a CLEC market share of 18.0%.<sup>[36]</sup>

### ***Other Estimates of Market Share***

25. The Department prepared its own estimate of market share based on data submitted in Minnesota Telecommunications Carrier Annual Reports made to the Department in May of each year. Based on this data, as of December 31, 2000, (ten months before Qwest's estimates), the Department calculates that CLECs have 13.5% of the market in Qwest's service territory; that facilities-based CLECs have 4.6% of the residential market; and that an additional 3.8% of lines were provided by CLECs using UNEs.<sup>[37]</sup> The Department is in the process of analyzing data for 2001, which will be broken down between business and residential lines, and will make the 2001 information available to the Commission, the parties, and the general public as soon as it is ready.<sup>[38]</sup>

26. In an effort to validate its approach, Qwest used its ported number methodology to calculate CLEC market share as of December 2000 (the time of the Department's estimate). Based on this method, Qwest estimated CLEC market share of 13.3% or 14%,<sup>[39]</sup> which is remarkably close to the Department's 13.5% estimate.

27. The Department's witness criticized the correspondence between the December 2000 figures as being coincidental, mainly because of his difficulty in reconciling Qwest's CLEC line counts with other reported data, *i.e.*, CLEC data reported to the FCC as of June 2001 and Qwest data reported to the FCC for year-end 2000. There is simply no way to reconcile these numbers, as they come from different sources, refer to different time periods, and are based on different categories of data.<sup>[40]</sup> Although the numbers in each category (UNE, resale, facilities-based) may not exactly correspond with the Department's, these calculations do generally support the use of Qwest's method in providing an overall estimate of market share. The other parties have not generally disputed that CLECs serve a substantial number of customers in Minnesota through wholly-owned bypass networks. Even based on the Department's data for 2000, facilities-based CLECs in Minnesota were serving 4.5% of the total retail lines in Qwest's service territory, and an additional 3.8% of the retail lines were provided by CLECs using UNEs.<sup>[41]</sup> The OAG/RUD witness suggested that Qwest's more recent data indicates that approximately 10% of the lines in Qwest's territory are being served by non-Qwest facilities.<sup>[42]</sup> These are more than "de minimus" numbers.

28. The differences between Qwest's 18% CLEC market share estimate and the DOC's 13.5% estimate appear to be substantially but not entirely the result of the Department's use of data for the year 2000. In a related docket, Qwest maintained that it lost approximately 75,000 lines in Minnesota in 2001.<sup>[43]</sup> There is no question but that CLECs made gains that year, although the extent of those gains is as yet undetermined.

29. The Department's method of determining market share appears to be the most reliable, because it is based for the most part on CLEC reports of actual numbers of lines in use. The Department's estimate of 13.5% was probably very accurate as of December 2000, but it clearly understates CLEC market share today. Assuming that Qwest lost all 75,000 lines to CLECs in 2001, the market share number would be approximately 16%. Of Qwest's estimates, the most reasonable figure based on the most current data appears to be the 18.0% figure, based on its ported number estimate. But whether the number is 13.5%, 18.0% or some number in between, these market share numbers greatly exceed those in other states in which BOCs have received § 271 authority.<sup>[44]</sup>

30. The record demonstrates that Qwest has approved interconnection agreements with unaffiliated competing providers that serve a substantial number of residential and business subscribers predominantly over their own facilities. Qwest has demonstrated that it meets the requirements of § 271(c)(1)(A), the Track A test.

## **PUBLIC INTEREST**

31. In addition to determining whether a BOC satisfies the competitive checklist and will comply with section 272, Congress directed the FCC to assess whether the requested authorization would be consistent with the public interest, convenience, and necessity.<sup>[45]</sup> Compliance with the competitive checklist is itself a strong indicator that long distance entry is consistent with the public interest.<sup>[46]</sup>

32. Nonetheless, the public interest analysis is an independent element of the statutory checklist and, under normal canons of statutory construction, requires an independent determination. The FCC views the public interest requirement as an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will therefore serve the public interest as Congress expected.<sup>[47]</sup>

33. The FCC has developed three criteria in making the public interest determination: (1) it considers whether granting the application "is consistent with promoting competition in the local and long distance telecommunications markets";<sup>[48]</sup> (2) the FCC looks for assurances that the BOC "would continue to satisfy the requirements of section 271 after entering the long distance market," by reviewing the BOC's performance plan, if it has one, and other available enforcement tools;<sup>[49]</sup> and (3) the FCC considers whether there are any remaining "unusual circumstances that would make entry contrary to the public interest under the particular circumstances of these applications."<sup>[50]</sup>

34. In addition, the FCC has indicated its interest in evidence that a BOC applicant has engaged in discriminatory or other anticompetitive conduct, or failed to comply with state and federal telecommunications regulations. Because the success of the market opening provisions of the Act depend, to a large extent, on the cooperation of incumbent LECs, including the BOCs, with new entrants and good faith compliance

by such LECs with their statutory obligations, evidence that a BOC has engaged in a pattern of discriminatory conduct or disobeying federal and state telecommunications regulations would tend to undermine the FCC's confidence that the BOC's local market will remain open to competition once the BOC has received interLATA authority.<sup>[51]</sup> While no one factor is dispositive, the overriding goal is to ensure that nothing undermines the conclusion, based on the Commission's analysis of checklist compliance, that markets are open, and will remain open, to competition.

## **Promoting Competition in the Local and Long-Distance Markets**

35. Under the first element of the public interest test, the FCC will consider whether granting the application "is consistent with promoting competition in the local and long distance telecommunications markets."<sup>[52]</sup> Specifically, the FCC has said:

[I]n conducting our public interest inquiry, we will consider and balance various factors to determine if granting a particular section 271 application is consistent with the public interest. For example, as we noted at the outset of this Order, it is essential to local competition that the various methods of entry contemplated by the 1996 Act be truly available. The most probative evidence that all entry strategies are available would be that new entrants are actually offering competitive local telecommunications services to different classes of customers (residential and business) through a variety of arrangements (that is, through resale unbundled elements, interconnection with the incumbent's network, or some combination thereof), in different geographic regions (urban, suburban, and rural) in the relevant state, and at different scales of operation (small and large). We emphasize, however, that we do not construe the 1996 Act to require that a BOC lose a specific percentage of its market share, or that there be competitive entry in different regions, at different scales, or through different arrangements, before we would conclude that BOC entry is consistent with the public interest. Rather, we believe that data on the nature and extent of actual local competition, as described above, are relevant, but not decisive, to our public interest inquiry, and should be provided. If such data are not in the record or available for official notice, we would be forced to conclude that the BOC is not facing local competition. Our inquiry then would necessarily focus on whether the lack of competitive entry is due to the BOC's failure to cooperate in opening its network to competitors, the existence of barriers to entry, the business decisions of potential entrants, or some other reason.<sup>[53]</sup>

36. As in the local market, the FCC presumes that "BOC entry into the long distance market will benefit consumers and competition if the relevant local exchange market is open to competition consistent with the competitive checklist."<sup>[54]</sup> Thus, the FCC has found that once a BOC proves that it has complied with the competitive checklist, it is "not require[d] . . . to make a substantial *additional* showing that its participation in the long distance market will produce public interest benefits."<sup>[55]</sup> As the FCC has stated, "[a]s a general matter, we believe that additional competition in telecommunications markets will enhance the public interest."<sup>[56]</sup>

37. Absent evidence that the BOC has failed to comply with the competitive checklist or erected barriers to entry, the FCC has rejected arguments that the following types of evidence demonstrate that the local market is not open and that competition has not sufficiently taken hold: (1) the low percentage of total access lines served by CLECs, (2) the concentration of competition in densely populated urban areas, (3) minimal competition for residential service, (4) modest facilities-based investment, and (5) prices for local exchange service at maximum permissible levels under the price caps.<sup>[57]</sup> Similarly, the FCC has noted that if a BOC has complied with the competitive checklist, it should not be penalized if “[f]actors beyond [its] control, such as individual competitive LEC entry strategies,” result in low CLEC customer volumes.<sup>[58]</sup>

38. In addition to the data described in the Track A section above, Qwest provided evidence that it has completed 570 physical CLEC collocations and 49 virtual collocations as of October 31, 2001,<sup>[59]</sup> CLECs were using 112,556 LIS trunks to interconnect with Qwest,<sup>[60]</sup> and Qwest was provisioning 71,018 stand-alone unbundled loops, as well as 79,111 UNE-P lines, to 29 different Minnesota CLECs.<sup>[61]</sup> In addition, as of October 31, 2001, a total of 938,956,748 minutes of use had been exchanged between CLECs and Qwest in Minnesota.<sup>[62]</sup> In addition, Qwest provided evidence that CLECs are active in 160 out of Qwest's 172 wire centers in the state.<sup>[63]</sup>

39. The Department contends that, absent evidence that “each and every geographic area in Minnesota is sufficiently open to competition,” approval of Qwest's application for § 271 authority is contrary to the public interest. This position goes far beyond what is mandated by the FCC. Although the extent of CLEC operations at wire centers in rural areas is not apparent from Qwest's evidence, the record does support the proposition that CLECs are at least moving into rural areas and smaller communities. There is no evidence, at least in this docket, that Qwest is refusing to collocate or provides inferior OSS in rural areas. That competition is concentrated in urban areas does not otherwise defeat Qwest's evidence that the local market is open to competition.<sup>[64]</sup>

40. Qwest offered three studies in support of its argument that Qwest's long distance entry will benefit consumers in that market. One is from the Telecommunications Research Action Center (“TRAC”); the second is by Dr. Jerry Hausman; and the third is a report by Ronald Binz.<sup>[65]</sup> None of them provides any evidence of what is likely to happen in Minnesota should Qwest receive § 271 approval.<sup>[66]</sup>

41. The TRAC study is based on a comparison of Verizon and non-Verizon interexchange long-distance pricing in New York, after Verizon received § 271 approval. The study purports to show that New York consumers will save up to \$284 million annually on long distance telephone service as a result of BOC entry into the interLATA market in New York.<sup>[67]</sup>

42. According to the Department, the TRAC results are suspect because TRAC is managed by a public relations firm whose clients include all RBOCs, including

Qwest.<sup>[68]</sup> The Department also contends that the methodology is flawed because it compares specific Verizon pricing plans with average prices offered by other carriers, a method that blurs the distinctions among the pricing plans of the competitors. These criticisms are well taken. In addition, the TRAC study is based solely on the New York market. Qwest is merely suggesting that the same results would hold true for Minnesota, a premise that is difficult to accept absent empirical evidence that the markets are similar.<sup>[69]</sup> At best, this study stands for no more than the general proposition that increased competition is in the public interest, a presumption that the FCC already grants to BOCs that meet the competitive checklist.<sup>[70]</sup>

43. The second study, done by Dr. Hausman and funded by Qwest, compared consumers' long distance bills in New York and Texas after BOCs had received § 271 authority with consumer bills in two states in which § 271 approval had not yet been granted, Pennsylvania and California. He concluded that there is "statistically significant evidence that BOC entry enabled the average customer to reap a 9-percent savings on her monthly interLATA bill in New York and a 23-percent savings in Texas."<sup>[71]</sup> Qwest employees then extrapolated these results to Minnesota revenue data and predicted a 15% savings on average in the long-distance market and a 4% savings in the local market should Qwest receive § 271 authority.<sup>[72]</sup>

44. Again, there is no factual basis for assuming that these results are applicable to Minnesota. More importantly, however, Dr. Hausman appears to have precluded the other parties from reviewing the data upon which his study was based. The data was purchased from TNS and Associates, a research firm that collects data concerning telephone bills, and Hausman returned it to TNS before the parties to this proceeding had the opportunity to request it. Qwest maintains that the data is still "publicly available," but it is available only to those members of the public with the funds to pay the hefty fee required to obtain it. The Hausman study accordingly sheds no light on what might happen to long-distance or local service bills in Minnesota.

45. Finally, Qwest relies on an October 2001 report by Ron Binz, a telecommunications analyst. This report makes no attempt to assess the potential impact of Qwest's entry into the long-distance market in Minnesota.

46. The Department and others contend that competition in the residential market is too low, that Qwest will be able to use its tremendous market power in this area to quickly remonopolize long-distance service, and consequently it is not in the public interest to grant it long-distance authority. The FCC has consistently maintained that low levels of CLEC entry in the residential market in a state do not necessarily reflect a "sin of omission or commission" by the BOC, because the residential market might not be attractive to CLECs even when conditions for entry are favorable.<sup>[73]</sup>

47. The CLECs' share of the residential market in Minnesota is higher than existed in other states when section 271 applications were granted. While Qwest estimates that CLECs have captured approximately 6% of the residential market in

Minnesota,<sup>[74]</sup> and the Department contends this figure is 3% to 4%, CLECs had captured less than 0.5% of the residential market in Vermont and less than 1.0% of the market in Maine when the FCC approved Verizon's applications for those states.<sup>[75]</sup>

48. Nonetheless, the Department maintains that because of Qwest's market power in the residential market, and its ability to exploit the "inbound marketing channel," it would be premature to conclude that Qwest's entry into the long-distance market is in the public interest. The "inbound marketing channel" is the communication or marketing channel between Qwest and its residential customers. Section 272(g) of the Act permits BOCs and their § 272 affiliates to engage in joint marketing efforts.<sup>[76]</sup>

49. In support of its argument, the Department presented a model developed by Dr. Selwyn and used in other § 271 proceedings to demonstrate what it believes to be the financial harm attributable to a BOC's ability to jointly market local and long-distance service. The model, once again, is based on Verizon's experience in New York . It assumes in one scenario that if Qwest were to maintain its present market share in the local service residential market (93.67%) for five years, that at the end of that period Qwest will have captured 70% of residential long-distance subscribers. In scenario two, it assumes that if Qwest market share in the local service residential market falls by 3% per year for five years, Qwest will still end up with 65% of the residential long-distance market.<sup>[77]</sup>

50. Qwest challenges the model on several grounds. First, the model assumes that a BOC will continue to take from other interexchange carriers "in perpetuity" the same percentage of customers each year that Verizon attracted in the very first year after its initial high-profile entry into the long distance market. In addition, the model assumes that a BOC will sign up 82% of inbound callers.<sup>[78]</sup> Given the uncertainties in the telecommunications industry today, these assumptions do not appear to be reasonable.

51. Furthermore, even if circumstances were to develop exactly as predicted by the model, it would not be inconsistent with the standards established by the Act and the FCC's orders. The Act requires that the local market be open to competition, not that competition be particularly robust, and it does not require that Qwest be divested of market power in order to gain § 271 approval. There is nothing in the Act that would oblige the FCC to accept a state commission's determination that, even though the federal standards otherwise were met, it would be "premature" to recommend § 271 approval.

52. The record evidence establishes that CLECs in Minnesota are offering service to different classes of customers (residential and business) through a variety of arrangements in different geographic regions and on different scales. Assuming Qwest satisfies the competitive checklist, there is no evidence in the record to suggest that recommending § 271 approval would be inconsistent with promoting competition in the local and long-distance markets.

## Assurances of Future Compliance

53. The second element of the FCC's public interest analysis considers whether the BOC has provided adequate assurance that the local exchange market will remain open after the application is granted.<sup>[79]</sup> A performance assurance plan constitutes "probative evidence" that the BOC will continue to meet its section 271 obligations and that its long distance entry is consistent with the public interest.<sup>[80]</sup> In addition, the FCC has determined that its enforcement authority under section 271(d)(6) is significant assurance of future compliance.<sup>[81]</sup> If at any time after the FCC approves a 271 application, it determines that a BOC "has ceased to meet any of the conditions required for such approval," it can exercise its enforcement remedies under section 271(d)(6), including imposition of penalties, suspension or revocation of 271 approval, and an expedited complaint process.<sup>[82]</sup>

54. The FCC has also recently established a "Section 271 Compliance Review Program" that is intended to "augment the Enforcement Bureau's existing section 271 oversight and will enhance the Bureau's ability to identify and act upon noncompliant conduct in a timely and appropriate manner."<sup>[83]</sup>

55. Qwest has filed with the Commission, in a related docket,<sup>[84]</sup> a plan for Minnesota (the "QPAP") that, among other things, provides performance measurements, a statistical methodology, and self-executing payments to CLECs and to the state.<sup>[85]</sup> The adequacy of Qwest's QPAP will be determined by the Commission in that docket.

## Unusual Circumstances

56. The final factor in analyzing the public interest is a review of the local and long-distance markets to ensure that there are no "unusual circumstances" that would make entry contrary to the public interest under the particular circumstances of the application at issue.<sup>[86]</sup> According to the FCC, any concerns about unusual circumstances must "relate to the openness of the local telecommunications markets to competition" in order to justify a decision to "deny or delay . . . [a section 271] application under the public interest standard."<sup>[87]</sup> The parties may not use the public interest inquiry to exact additional terms and conditions regarding items covered by the competitive checklist.<sup>[88]</sup> Nor will the FCC, in the section 271 context, "attempt to settle new and unresolved disputes about the precise content of an incumbent LEC's obligations to its competitors."<sup>[89]</sup> Furthermore, the FCC has concluded that:

. . . The section 271 process simply could not function as Congress intended if we were generally required to resolve all such disputes as a precondition to granting a section 271 application. . . . [Section 271 proceedings] are often inappropriate forums for the considered resolution of industry-wide local competition questions of general applicability. . . . [F]ew of the substantive obligations contained in the local competition provisions of sections 251 and 252 are altogether self-executing; they rely for their content on the Commission's rules.<sup>[90]</sup>

### ***Unfiled Agreements***

57. As noted above, the Unfiled Agreements docket has been imported into this one based on a preliminary determination that the issues raised in that docket may have public interest implications. Because of the timing of the hearings, the parties are just now preparing their briefs in that docket, and there are significant disagreements about some of the facts and the interpretations to be drawn from the facts. Those disagreements must be reviewed by the Commission before it can be said, with certainty, whether or not anything in that docket might affect the Commission's public interest recommendation. The Administrative Law Judge anticipates issuing his report in the Unfiled Agreements docket by September 20, 2002. The Administrative Law Judge will address any public interest issues raised by the unfiled agreements in that report.

### ***UNE Pricing***

58. During the hearing WorldCom contended that there is a "price squeeze" in that UNE wholesale prices provide an insufficient margin to permit CLECs to enter the residential market using the UNE-platform. In its post-hearing submissions, WorldCom does not assert a price squeeze argument but maintains that the Commission should ensure the long-term provision of the UNE platform under its state law authority. The FCC is currently engaged in a review of its policies on UNEs as part of its triennial review process.<sup>[91]</sup>

59. With regard to any pricing issues, the Commission ordered an extensive review of UNE-P prices and previously unpriced elements in the related pricing docket that was completed just a few weeks ago. The Commission is in a good position to ensure that prices are set appropriately to support competition in the future. With regard to the long-term provisioning issue, this is a matter more appropriately pursued in another docket. There is no legal basis for making Qwest's § 271 approval contingent on avoiding something the FCC may or may not elect to do in future orders concerning UNEs.

### ***Intrastate Access Charges***

60. AT&T and WorldCom both expressed concerns that Qwest's intrastate access charges would give it an advantage in the long distance market and maintain that access charges must be set at cost or competition will be jeopardized.<sup>[92]</sup> The Commission is currently conducting an investigation of intrastate access charges in Minnesota.<sup>[93]</sup>

61. In its orders approving section 271 applications, the FCC has never determined that access charge reform is a precondition to granting an application. Rather, the FCC has determined that Congress did not intend access charge reform to

be a precondition for granting a section 271 application: “Congress anticipated that some Bell Operating Companies (“BOCs”) would obtain authorization under 47 U.S.C. 271 to originate in-region long-distance services *before the completion of access charge reform*.”<sup>[94]</sup> As WorldCom suggests, this is a matter more appropriately considered in the Commission's investigation of access charges.

### ***Structural Separation***

62. Several parties suggest that the Commission should use the public interest inquiry as an opportunity to impose some form of structural or functional separation of a BOC's wholesale and retail operations.<sup>[95]</sup> The FCC has never required any form of structural or functional separation of wholesale and retail operations in any of its orders approving section 271 applications. In its most recent section 271 order, the FCC specifically rejected efforts to condition section 271 approval on structural separation:

The NJDRA contends that approval of Verizon's application for section 271 authority is not in the public interest without first requiring structural separation of Verizon's retail and wholesale operations. However, the Act does not require structural separation as a condition to section 271 approval, and we do not require it here.<sup>[96]</sup>

63. The Commission may well have authority under state law to impose some type of structural or functional separation in response to specific issues arising in Minnesota,<sup>[97]</sup> but any such action would have to be based on a more fully developed record than exists here. The evidence in this docket provides no basis for recommending either structural or functional separation of Qwest's retail and wholesale operations.

### ***Qwest Retail and Wireless Customer Service Complaints***

64. The OAG presented evidence that many customers have filed complaints involving matters such as billing disputes and how they are resolved, waiting times to reach customer service representatives, and other consumer interactions with Qwest's retail customer service personnel. The OAG maintains that the volume of retail complaints suggests that Qwest is so insulated from competition that it is not in the public interest to recommend § 271 approval. In the alternative, the OAG maintains that the public interest standard should be defined more broadly as an inquiry into whether Qwest's entry into the long-distance market will promote actual and effective competition resulting in lower prices and better service quality for retail customers.

65. The FCC has determined that states may not condition a BOC's section 271 approval on commitments to improve the quality of its retail service. In the *Non-Accounting Safeguards Order*, the FCC rejected the Wisconsin Public Service Commission's claim that states could condition or delay a BOC's entry into the long-distance market as “appropriate leverage exercised in the public interest” in order to obtain “needed quality of service improvements” for intrastate service.<sup>[98]</sup> The FCC

ruled that if a state wishes to regulate these areas, it must do so outside the section 271 process and “through mechanisms other than denial or delay of entry into the intrastate interLATA market.”<sup>[99]</sup> The OAG's alternative formulation of the public interest standard essentially seeks to require improvement in service quality through the § 271 process, which the FCC has declined to permit. If Qwest successfully meets the competitive checklist, complaints about retail service would provide no basis for concluding that the local market is insufficiently open to competition.

### ***CLEC Complaints***

66. Some of the parties contend that certain complaints about Qwest's conduct establish that Qwest operates in an anticompetitive manner that suggests the market will not remain open in the future. The *AT&T Complaint* concerned Qwest's refusal to provide UNE testing pursuant to its interconnection agreement with AT&T. There, the Commission accepted the ALJ's findings and conclusions that Qwest's conduct was anticompetitive, and it voted to impose a substantial fine upon Qwest as a sanction. The *Onvoy Complaint* concerned Qwest's pricing of collocation elements that were not explicitly priced in the 1999-2000 Generic Cost Docket orders. After a contested case hearing, the Commission established appropriate rates for the disputed elements. Finally, POPP Communications and Jaguar Communications filed affidavits in the Non-OSS docket considering Qwest's compliance with checklist item 3, documenting their difficulties in obtaining access to poles, ducts, and rights of way.<sup>[100]</sup> In that docket the Administrative Law Judge found that POPP's and Jaguar's allegations “do not defeat Qwest's evidence that its agreements otherwise demonstrate compliance with the Checklist Item 3 requirements.”<sup>[101]</sup>

67. The Commission has the full record relating to all three of these matters before it. Qwest characterizes these matters as “anecdotal” evidence of “isolated incidents,” which is by no means an accurate characterization of disputes that took months if not years to resolve and required significant expenditures of resources by the parties involved. Nonetheless, the Administrative Law Judge in this docket is unable to find that Qwest's practices as illuminated in these disputes have such anti-competitive overtones as would require withholding of § 271 approval.<sup>[102]</sup>

### ***CLEC Failures***

68. Several witnesses maintained that the financial difficulties of CLECs suggest that the public interest is not served by recommending Qwest's application for § 271 authority. The FCC does not consider the financial strength of CLECs in assessing whether the local market is open to competition, assuming the BOC has complied with the competitive checklist.<sup>[103]</sup> No evidence in this record would suggest that CLEC failures in Minnesota constitute an unusual circumstance that would preclude Qwest from satisfying the public interest requirement.

### ***Touch America***

69. Touch America has filed two complaints against Qwest with the FCC involving the scope of the Qwest-U S WEST merger approval order and related questions about the interLATA market. The FCC has determined that disputes arising from BOC merger orders that are currently being considered in its complaint dockets are best resolved in those other pending dockets, and not in connection with section 271 applications.<sup>[104]</sup> Touch America's complaints have no relationship to local competition issues in Minnesota and should not be considered as part of this § 271 proceeding.

### ***Qwest's Win Back Program***

70. The OAG maintains that Qwest's Win Back program discriminates against reseller CLECs because Qwest waives charges for end-user customers that it does not waive for CLEC resellers. As a remedy, OAG asks that the Commission either re-set the wholesale discount rate or preclude Qwest from offering such programs to customers of resellers. The operation and impact of Qwest's Win Back program is being considered in the related docket concerning OSS checklist items.

71. The FCC has made clear that in the absence of any formal FCC complaint that a BOC has violated section 222(b), allegations of improper marketing through Win Back programs are appropriately handled at the state level and that state commissions can act to ensure that improper marketing activities are curtailed.<sup>[105]</sup> The FCC does not see these issues as being appropriate to a public interest analysis.

### ***Termination Liability Assessments ("TLAs")***

72. The CLEC Coalition argues that termination liability assessments ("TLAs") provided for in some of Qwest's contract services agreements "frustrate the congressional intent that markets be open,"<sup>[106]</sup> and that approval of Qwest's section 271 application should be conditioned on Qwest's adopting a one-year "fresh look" period that would allow Qwest customers switching to a facilities-based CLEC to terminate its contracts without penalty.<sup>[107]</sup> The CLEC Coalition seeks such relief pursuant to the Commission's "separate authority" under 47 U.S.C. § 253(b) and Minn. Stat. §§ 237.06 and 237.081. The impact of Qwest's use of TLAs is being addressed in the related docket concerning OSS checklist items.

73. The FCC has determined that TLAs could, in certain circumstances, be unreasonable and anticompetitive; the absence of a fresh look requirement, however, provides no basis for concluding Qwest's entry into the long-distance market is not consistent with the public interest. The FCC has determined that these issues are best raised in other proceedings.<sup>[108]</sup>

### ***Feature Group C Signaling***

74. IntraLATA 1+ toll traffic must be accurately identified for access charge billing. Qwest terminates this traffic using Feature Group C signaling (also referred to

as "BOC signaling" or "traditional signaling") and has done so since the pre-divestiture period (i.e., prior to 1983).<sup>[109]</sup> Feature Group C signaling contains only the called telephone number and cannot identify the Presubscribed Interexchange Carrier ("PIC") code necessary to bill for access charges. The CLEC Coalition/MIC maintains that use of this signaling protocol leads to uncertainty and billing disputes over charges for termination access services. This is undoubtedly an important issue, but there is no record to support the remedies advocated in this proceeding. This is not a public interest issue, but an intercarrier compensation issue that is more appropriately be resolved in a different proceeding.<sup>[110]</sup>

### ***Qwest's Corporate Attitude***

75. AT&T argues that Qwest's "corporate attitude "does not provide any assurances that its markets, once opened, will remain so."<sup>[111]</sup>

76. Satisfactory completion of the competitive checklist, the Track A, and public interest tests, as well as the adoption of a performance assurance plan, are the proper mechanisms for guaranteeing that a BOC's conduct will promote a competitive environment after a BOC wins section 271 approval. Qwest's corporate attitude is not relevant to the public interest inquiry.

77. Subject to any determinations made in the Unfiled Agreements docket, there are no "unusual circumstances" that would make entry contrary to the public interest under the particular circumstances of Qwest's application.

78. Any of the foregoing findings more properly considered to be conclusions of law are adopted as such.

Based on the Foregoing Findings of Fact, the Administrative Law Judge makes the following:

### **CONCLUSIONS OF LAW**

1. The Administrative Law Judge and the Commission have jurisdiction in the matter under 47 U.S.C. §§ 271(c)(1)(A) and 271(d)(3)(C) and Minn. Stat. §§ 14.50, 237.02, 237.081, 237.16, and 237.462.

2. Qwest has demonstrated by a preponderance of the evidence that it meets the requirements of section 271(c)(1)(A) for proceeding under Track A.

3. The Commission will not be able to determine whether Qwest meets its burden of proving that § 271 approval is consistent with the public interest, convenience, and necessity, as required by section 271(d)(3)(C), until the Commission has made final decisions in the related dockets concerning the competitive checklist items, the separate affiliate requirement, Qwest's QPAP, and Unfiled Agreements.

4. Subject to satisfactory determinations in the related dockets, the evidence in this docket would not preclude a finding that Qwest's entry into the long-distance market would be consistent with the public interest, convenience, and necessity.

## RECOMMENDATIONS

IT IS RESPECTFULLY RECOMMENDED that the Public Utilities Commission defer a final ruling on this docket until it obtains all the information necessary to make a public interest determination.

Dated: August 20, 2002

/s/ Allan W. Klein  
ALLAN W. KLEIN  
Administrative Law Judge

[1] 47 U.S.C. § 271, § 271(d)(1)-(3).

[2] *Id.* at § 271(d)(3)(A).

[3] *Id.* at § 271(d)(3)(C).

[4] *See Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, 12 FCC Rcd 20543 ¶ 30 (1997) (*Ameritech Michigan Order*).

[5] 47 U.S.C. § 271(d)(3)(C).

[6] Prehearing Order, October 3, 2001.

[7] Second Prehearing Order ¶ 2, October 18, 2001.

[8] *In the Matter of the Complaint of the Minnesota Department of Commerce against Qwest Corporation Regarding Unfiled Agreements*, MPUC Docket No. P-421/C-02-197; OAH Docket No. 6-2500-14782-2.

[9] Eighteenth Prehearing Order, May 23, 2002.

[10] Tr. 4:55-61.

[11] For further explanation see Finding 57, *supra*.

[12] *See Ameritech Michigan Order* ¶¶ 71, 75, 80, 86.

[13] *Id.* ¶ 101.

[14] *Id.* ¶ 75.

[15] *Id.* ¶ 78.

[16] *Id.* ¶ 75.

[17] *Id.* ¶¶ 76- 79. Congress specifically rejected versions of Track A that would have included a specific CLEC market share requirement or required the BOC to demonstrate the existence of a competing carrier "capable of providing a *substantial* number of business and residential customers" with service. *Id.* at ¶ 77 n. 170 (emphasis in original).

[18] *See Ex. 301 (Teitzel Direct)* at 10.

[19] *Id.* at 10 n.15.

[20] *Id.* at 10.

[21] *See id.* at Trade Secret DLT-4.

[22] *Id.* at DLT-6.

[23] *Id.* at Trade Secret DLT-8.

[24] *See id.* at DLT-6.

[25] In its applications to the FCC, SBC was able to prove that more than a "de minimus" number of residential customers were served by the UNE-P in Kansas using the E911 estimation method and the LIS trunk method, based upon a trunk-to-line ratio of 2.75. *See In the Matter of the Joint Application by*

*SBC Communications, Southwestern Bell Telephone Company and Southwestern Bell Communications Services Inc., d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, 16 FCC Rcd 6237, ¶ 42 & n.96 (2001) (*SWBT Kansas/Oklahoma Order*).

[26] *Id.* at 19.

[27] *Id.* at 23; Trade Secret DLT-7.

[28] *Id.* at 24.

[29] Ex. 304 (Teitzel Rebuttal) at 14-15, n.22.

[30] Ex. 337 at 15-17.

[31] *Id.* at 13-16.

[32] See Ex. 302 (Teitzel Direct) at 21, Trade Secret DLT-8.

[33] Ex. 30 at 21-23.

[34] See Ex. 301 (Teitzel Direct) at 29; Trade Secret DLT-9.

[35] See Ex. 301 (Teitzel Direct) at 23-26, DLT-6; Ex. 342.

[36] See *id.* Qwest has estimated that CLECs have 36.5% of business lines and 6.3% of residence lines, for a combined market share of 18.0%. *Id.*

[37] See Ex. 326 (Doyle Aff.) at Attachment A.

[38] Ex. 326 at ¶ 14; Tr. 2:73-74.

[39] See Ex. 342 and revisions filed June 10, 2002.

[40] For example, the FCC's *Local Telephone Competition: Status as of June 30, 2001* (February 2002) report, which finds a CLEC market share of 11% in Minnesota, is based on state-wide data and is not limited to Qwest's service territory. See Ex. 329 at 33 n. 30. Furthermore, it is not clear whether the ARMIS data reported by Qwest includes resale or UNE-P lines. See Surrebuttal Affidavit of Lee L. Selwyn at 9 (filed June 17, 2002).

[41] Ex. 326 (Doyle Aff.) at Attachment A.

[42] See Ex. 329 (Lehr Direct) at 36.

[43] Qwest Corporation's Post-Hearing Brief, *In the Matter of the Commission's Review and Investigation of Qwest's Unbundled Network Element (UNE) Prices*, PUC Docket No. P-421/CI-01-1375, OAH Docket No. 12-2500-14490-2, at 15 (June 21, 2002).

[44] At the time of SWBT's § 271 approval, CLECs had market shares of 6.5% in Georgia, 8% in Texas, 9% to 12.6% in Kansas, and 5 1/2% to 9% in Oklahoma. Tr. 3:26; *In the Matter of Application by SBC Communications Inc., Southwestern Bell Telephone Co., and Southwestern Bell Communications Services Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, 15 FCC Rcd 18354, ¶ 5 (2000) (*SWBT Texas Order*); *SWBT Kansas/Oklahoma Order* ¶¶ 4-5.

[45] 47 U.S.C. § 271(d)(3)(C).

[46] *In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953, ¶ 422 (1999) (*Bell Atlantic New York Order*).

[47] *Id.* at ¶ 423.

[48] *SWBT Kansas/Oklahoma Order* ¶ 268.

[49] *Id.* at ¶ 269.

[50] *Id.* ¶ 267; see also *id.* ¶¶ 281-82.

[51] *Ameritech Michigan Order* ¶ 397.

[52] *SWBT Kansas/Oklahoma Order* ¶ 268.

[53] *Ameritech Michigan Order* ¶ 391.

[54] *Bell Atlantic New York Order* ¶ 428; *SWBT Texas Order* ¶ 419; *SWBT Kansas/Oklahoma Order* ¶ 268.

[55] *Bell Atlantic New York Order* ¶ 428 (emphasis in original).

[56] *Id.*

[57] See *Bell Atlantic New York Order* ¶ 426; *SWBT Texas Order* ¶ 419.

[58] *In the Matter of the Application of Verizon New England Inc., Bell Atlantic Communications Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks Inc. for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, 16 FCC Rcd 8988, ¶ 235 (*Verizon Massachusetts Order*); see also *SWBT Kansas/Oklahoma Order* ¶ 268.

[59] Ex. 301 (Teitzel Direct) at 10-11.

[60] *Id.* at Trade Secret DLT-8.

- [61] *Id.* at DLT-16.
- [62] *Id.*
- [63] Ex. 300 at 14, Table 1; *id.* at 17, Table 3.
- [64] *Bell Atlantic New York Order* ¶ 426.
- [65] See Ex. 301 (Teitzel Direct) at 43-45; Ex. 304 (Teitzel Rebuttal) at 47-50.
- [66] Indeed, the FCC has specifically declined to consider economic studies seeking to demonstrate alternately that a BOC's entry will have either a positive or negative impact on competition in the long-distance market. *Bell Atlantic New York Order* ¶ 428.
- [67] See Ex. 301 (Teitzel Direct) at 44-45.
- [68] Ex. 337 at 30.
- [69] Tr. 1:43.
- [70] *Bell Atlantic New York Order* at ¶ 428.
- [71] See Jerry A. Hausman, Gregory K. Leonard, J. Gregory Sidak, *The Consumer-Welfare Benefits from Bell Company Entry into Long-Distance Telecommunications: Empirical Evidence from New York and Texas*, available at [http://papers.ssrn.com/sol3/delivery.cfm/SSRN\\_ID289851\\_code011106140.pdf?abstractid=289851](http://papers.ssrn.com/sol3/delivery.cfm/SSRN_ID289851_code011106140.pdf?abstractid=289851) (Jan. 9, 2002), at 3 ("Hausman Study").
- [72] Tr. 1:45-47.
- [73] *Bell Atlantic New York Order* ¶¶ 426-27.
- [74] See Ex. 301 (Teitzel Direct) at DLT-6.
- [75] See Ex. 304 (Teitzel Rebuttal) at DLT-A.
- [76] 47 U.S.C. § 272(g).
- [77] Ex. 337 at 53, Att. 18.
- [78] Ex. 338 (Selwyn Aff.) at 51-52 & n.105.
- [79] See *Bell Atlantic New York Order* ¶¶ 422-23; *SWBT Texas Order* ¶¶ 416-17.
- [80] *Bell Atlantic New York Order* ¶ 429.
- [81] See 47 U.S.C. § 271(d)(6); see also *Bell Atlantic New York Order* ¶¶ 429-430.
- [82] 47 U.S.C. § 271(d)(6).
- [83] See "FCC's Enforcement Bureau Establishes Section 271 Compliance Review Program," Public Notice, DA 02-1322 (rel. June 6, 2002).
- [84] See Reply of Qwest Corporation to Comments on the QPAP, *In the Matter of Qwest's Performance Assurance Plan (QPAP)*, Docket No. P-421/AM-01-1376 (Apr. 4, 2002).
- [85] In its hearing on the QPAP docket (P-421/AM-01-1376), the Commission decided to adopt the performance assurance plan Qwest had agreed to adopt in Colorado. Comments on the Commission's decision are due on July 31, 2002 and reply comments are due August 14, 2002.
- [86] *SWBT Kansas/Oklahoma Order* ¶ 267.
- [87] *In the Matter of the Application by Verizon New Jersey Inc., Bell Atlantic Communications Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc. and Verizon Select Services Inc. for Authority to Provide In-Region, InterLATA Services in New Jersey*, at ¶ 190 (June 24, 2002) (*Verizon New Jersey Order*) (allegations that a BOC has prematurely solicited long-distance customers may amount to violations of federal law but do not relate to the openness of local markets to competition).
- [88] 47 U.S.C. § 271(d)(4).
- [89] *SWBT Kansas/Oklahoma Order* ¶ 19.
- [90] *Id.* (footnotes omitted).
- [91] Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 16 FCC Rcd 22781 (2001).
- [92] See Ex. 322 (Roth Aff.) at 19-21; Ex. 323 (Roth Surreply Aff.) at 5-14; Ex. 310 (Price Direct) at 26-27.
- [93] See *In the Matter of a Commission Investigation of Intrastate Access Charge Reform*, Docket No. P-999/CI-98-674.
- [94] Supplemental Order Clarification, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 9587 ¶ 19 (2000) (emphasis added) ("Supplemental Order Clarification").

<sup>[95]</sup> See Ex. 322 (Roth Aff.) at 33-40; Ex. 338 (Selwyn Aff.) at 58-66; Ex. 329 (Lehr Direct) at 67-79; Tr. 2:16-23; Tr. 3:19.

<sup>[96]</sup> *Verizon New Jersey Order* ¶ 183 (footnote omitted).

<sup>[97]</sup> *Id.* ¶ 183 n. 568.

<sup>[98]</sup> *Non-Accounting Safeguards Order* ¶ 29 (quoting the Wisconsin Commission Reply at 7). See also *id.* ¶ 47.

<sup>[99]</sup> *Id.* ¶ 47 & n.97.

<sup>[100]</sup> Checklist Compliance Order.

<sup>[101]</sup> *Id.* ¶ 56.

<sup>[102]</sup> See *Verizon New Jersey Order* ¶ 182.

<sup>[103]</sup> See *In the Matter of Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, ¶ 126 (2001) (*Verizon Pennsylvania Order*).

<sup>[104]</sup> See *Verizon Connecticut Order* ¶ 79 (noting that concerns with “Verizon’s compliance with the conditions of the Bell Atlantic/GTE merger . . . [should] be appropriately addressed in the Commission’s” merger audit proceedings, not the public interest inquiry).

<sup>[105]</sup> See *BellSouth Georgia/Louisiana Order* ¶¶ 302-03.

<sup>[106]</sup> Ex. 305 (Snoddy Direct) at 2; 5.

<sup>[107]</sup> See Ex. 305 (Snoddy Direct) at 7; Ex. 307 (Snoddy Surreply) at 4.

<sup>[108]</sup> See *SWBT Texas Order* ¶¶ 392, 433.

<sup>[109]</sup> See Ex. 308 (Farm Direct) at 3-4.

<sup>[110]</sup> See *BellSouth Georgia/Louisiana Order* ¶ 208.

<sup>[111]</sup> AT&T points to a variety of sources in support of its conclusion that Qwest must change its corporate attitude to merit § 271 approval, including complaints in Colorado and Washington relating to Qwest’s provision of access to sub-loops and its actions towards Sun West, MCI Metro, and Rhythms. Allegations regarding Qwest’s conduct in Colorado and Washington are not relevant to the public interest inquiry in Minnesota, and should not be considered here.